IN THE

Supreme Court of the United States

October Term 1942

No. .....

JOHN J. FULTON COMPANY, a corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

BRIEF IN SUPPORT OF PETITION.

1. IT IS AGAINST PUBLIC POLICY TO FOSTER AN INSULIN MONOPOLY—WHEN GOVERNMENT RECORDS SHOW THAT THE DIABETES MORTALITY RATE IS INCREASING MORE RAPIDLY SINCE INSULIN WAS INTRODUCED, IN 1923, THAN BEFORE.

The Census Bureau of the Department of Commerce has recently issued its Vital Statistics Special Report, dated August 4, 1942, on the mortality rate of diabetes mellitus, which is attached hereto in the Appendix. The Court may take judicial notice of this Government Report.

Insulin came into general use by physicians, as an accepted treatment for diabetes, in about 1923 [R. 107].

Table A of the Census Report, therefore, is quoted for the three years, 1900, 1923 and 1940, as follows:

Year	Deaths from diabetes Mellitus	Rate per 100,000 estimated population
1940	35,015	26.6
1923	17,153	17.7
1900	2,187	11.0

Upon this issue of monopoly:

1. The Commission found that "there is no accepted treatment for diabetes other than diet and insulin adjusted properly to meet the needs of each patient" [R. 59]; and

2. Petitioner's statement of the points to be relied upon in the Circuit Court complained that the Order of the Commission was "conducive to monopoly" [R. 375].

The Circuit Court opinion states: "it is urged that the Commission's order tends to promote monopoly * * * But a study of the record dissipates any feeling of apprehension that the public will suffer injury from the action taken here." (*supra* 5.) The Government Report had not then been issued and was not before the Court.

It is respectfully submitted that the public interest is of first importance in this case, and that no order should stand that bars any bona fide, meritorious treatment of diabetes.

Capon Water Company v. Federal Trade Commission, 107 Fed. (2d) 516, at 517:

> "If, on the other hand, they (mineral waters) do possess separate curative properties, their use and so their advertising should be encouraged."

2. IT WAS AGAINST PUBLIC POLICY FOR THE COMMISSION NOT TO PERMIT DR. MODERN, ITS OWN WITNESS, TO MAKE THE CLINICAL TEST OF UVURSIN HE SET UP AND WANTED TO MAKE; AND FOR THE CIRCUIT COURT NOT TO ORDER SAID TEST AS PRAYED BY PETITIONER.

Dr. Modern is a physician and surgeon. He is a graduate of the German University of Prague. He has been a resident of this country since 1923, when Insuin came into use. In 1923, he was associated with Dr. Allen, head of the physicians at Rockefeller Institute, in the "department devoted to research and study of diabetes and kidney disease" [R. 87-8]. Please note that diabetes and kidney diseases were so classified together.

Since 1931, Dr. Modern has been an attending physician, and in charge of one of the four diabetic services, at the Los Angeles County General Hospital [R. 88]. With his experience and training, as a practical physician and research student, it was natural that he wanted to give Uvursin a clinical test at the General Hospital. He testified:

> "I want to be perfectly fair in this thing. I obtained a supply from the J. J. Fulton Company of Uversin. I was all set to go ahead on my service in the County Hospital, to go ahead under controlled conditions using this product, that is, put the patient first on a diet, then give him Uversen; then take Uversin away. In other words, see how the thing acts in the same patient. * * *" [R. 110; *supra* 7.]

He later wrote the Commission Agent engaged in preparing this case against petitioner how Dr. Thienes, another Commission witness, had persuaded him not to go

on with the test, and that "I am sorry that I could not make my clinical trial as I intended to do." His letter stated:

> "* * * Shortly after your visit here, I had the Fulton Company send me a sample of Uversin, which I intended to use on my Diabetic Service at the County Hospital. Before doing so, however, I conferred with Doctor Thienes (one of the other 'experts'), who told me that many of these preparations contain synthalin, which is a guanidine derivative and is very difficult to demonstrate by chemical methods. Synthalin is a liver poison, so I did not wish to expose my patients to that potential danger. * * * I am sorry that I could not make my clinical trial as I intended to do." [R. 113; *supra* 8.]

The record shows that Uvursin does not contain synthalin [R. 59]. Therefore, the test was prevented on unfounded suspicion. The subsequent order was based on a different ground, that "The use of this preparation may be definitely harmful to a patient suffering from diabetes mellitus, in that it would give a false sense of security and delay the inauguration of effective treatment." [R. 62.]

The Commission's agent in charge proceeded with the case, and the Commission acted, without the benefit of this test. The Commission found:

> "That plant materials listed in respondent's preparation have enjoyed a very long reputation, particularly in folklore medicine, for the treatment of urinary conditions, and some of these plant materials were formerly used in the form of tea for bladder and kidney diseases." [R. 60]

Because of its symptoms, both in the disease and in its response to treatment, diabetes was classified with bladder and kidney diseases as late as 1923 [R. 88].

The clinical test proposed by Dr. Modern would have determined the truth about Uvursin. In the Circuit Court petitioner consented to the test, urged why it should be made, and prayed that it be authorized and directed by the Court, provided only that petitioner be represented by a competent and acceptable physician in association with Dr. Modern.

In a brief before the Circuit Court Petitioner stated:

> "Petitioner now consents to the clinical test proposed and set up by Dr. Modern, the Commission's witness, provided only that petitioner is represented by a competent and acceptable physician in association with Dr. Modern, in the conduct of the tests."

and submitted:

> "1. That the merits of Uvursin, and the truth or falsity of petitioner's advertisements, published exclusively in Medical Journals, and in circulars sent exclusively to accredited physicians, could be determined by the clinical test, proposed by Dr. Modern, the Commission's witness, and consented to by petitioner, as aforesaid."
>
> "2. That said test should be in the Los Angeles County General Hospital, as proposed, and should be conducted by Dr. Modern and a competent and acceptable physician to be named by petitioner;"

and prayed:

> "1. That said clinical test be authorized and directed as aforesaid;"

Petitioner cited *Capon Water Company v. Federal Trade Commission* (*supra*).

The Circuit Court made the following statement on this issue:

> "* * * Petitioner intimates that the decision adverse to the making of the experiment was in some way induced or inspired by the Commission, but there is nothing whatever in the record to support the argument." [R. 384; *supra* 5.]

Petitioner means no offense to the Commission, but respectfully insists upon the facts shown by the Commission's own witness, Dr. Modern, in his said testimony and letter, and respectfully insists that the Commission, through its agent in charge, proceeded against petitioner, and later condemned Uvursin, without permitting the test set up and desired by its own witness.

The Circuit Court then disposed of the issue as follows:

> "It goes without saying that the petitioner was itself at liberty to have clinical tests of this character conducted and to present the results to the Commission if it saw fit." [R. 384; *supra* 5.]

The following is submitted to show that petitioner did furnish proof of such a clinical test:

Dr. Modern stated the requirements of a clinical test. (*Supra* 7.) In Dr. Cowles' practice, tests were always made to see the progress by checking the general feeling of the patient, the blood sugar content, and the sugar in the urine. He did this in all of the cases mentioned. All

of his testimony is based on blood tests as well as urine tests. (*Infra* 28-9.)

Dr. Cowles always tried Insulin first, but used Uvursin where Insulin failed. (*Supra* 9.)

In one case, where gangrene had set in and he had to amputate both legs of a patient 76 years old, he found that the stumps would not heal and the sutures would not hold. After Insulin failed, he tried Uvursin. The sugar decereased, the sutures held, the stumps healed, and the patient lived until he died from pneumonia four years later. (*Supra* 9; *Infra* 25-6, 28.)

In another case, an 81 year old patient, with chronic diabetes, no Insulin was used because the patient would not take a hypodermic. He was treated with Uvursin and diet, and lived for four years. (*Supra* 9; *Infra* 26-7.)

In another case, a patient 52 years old, with chronic diabetes, was treated with Uvursin only, in 1934. He is still working hard in the oil fields as a roustabout. This patient had previously taken Insulin, but had had trouble. He has not taken any Insulin since he started Uvursin in 1934. (*Supra* 9-10; *Infra* 27, 29-30.)

A woman patient, 52 years old, broke a needle in her shoulder muscle and refused to take any more Insulin. She was given Uvursin in 1934, and has never used Insulin since. She is still "going strong". (*Infra* 27-8.)

It is submitted, therefore, that the failure of the Commission to permit Dr. Modern to make his test, and the Court's failure to order it, was against public policy.

3. THE DEATH SENTENCE CEASE AND DESIST ORDER IS BASED UPON A MISAPPLICATION OF THE HAYNES CASE, BOTH IN QUALIFYING THE COMMISSION'S INCOMPETENT WITNESSES AND IN BLACKING OUT PETITIONER'S PROOF.

The Commission's Cease and Desist Order is nominally against petitioner's advertising matter. It is actually a death sentence of both petitioner and Uvursin. Any feature of the advertising justly found objectionable could be corrected without the death sentence.

The *Haynes, Neff, Goodwin* and *Caldwell* cases were cited by the Court to qualify the testimony of the Commission witnesses, none of whom had any experience with or practical knowledge of Uvursin. (*Supra* 4.) The *Haynes* and *Alberty* cases were cited by the Court on the proposition that the testimony of petitioner's witnesses, based upon actual experience, "had little probative value as compared to expert testimony based on general knowledge." (*Supra* 4-5.)

This erroneous application of the *Haynes* case was made by the Court although the Commission's best witness, in search of qualifying knowledge, had set up a clinical test at the great Los Angeles County General Hospital, where he was in charge of a Diabetic Service, had wanted to make the test, and had so informed the Commission's agent in charge of the case, and although petitioner consented and prayed that the Court order and direct that the test be made. (*Supra* 15-6, 17-8.)

The findings of the Circuit Court upon which it affirmed the Cease and Desist Order of the Commission were

contrary to the actual experience of the eminently qualified Dr. Cowles (*Supra* 8-9), as follows:

1. The Court found that "In diabetic cases the effect of these drugs (ingredients of Uvursin) is illusory." (*Supra* 3.) Dr. Cowles used Uvursin in the treatment of a patient with gangrene in both legs, where the legs had to be amputated, where Insulin failed, and where Uvursin succeeded. (*Supra* 9; *Infra* 25-6, 28.)

2. The Court found that "By increasing the flow of the urine they dilute its sugar content, while the actual condition of the patient remains as before." (*Supra* 3.) Dr. Cowles found in his experience that after the first few days there was no increase in the volume of urine, and that there was not any condition that could be termed polyuria. (*Infra* 29.)

3. The Court found that "Uvursin, without diet, was found to be devoid of therapeutic value in the treatment of the malady." (*Supra* 3.) Dr. Cowles found in his experience that there were certain cases of diabetes where diet alone would control, and where it was not necessary to give Uvursin, but that it was his experience that by the administration of Uvursin with the diet better results followed. (*Supra* 10.)

4. The Court found that "in diabetic cases there may be spontaneous or temporary remissions, depending in part on the character of the diet." (*Supra* 4.) Dr. Cowles found in his experience that if Uvursin wasn't the cure, it was one of those strange coincidents that are talked

about, because there was no treatment except Uvursin and the gangrene did disappear. He found that Uvursin adds to the value of diet in the treatment of diabetes. (*Infra* 28.)

In Dr. Cowles' practice, tests were made to see the progress by checking the general feeling of the patient, the blood sugar content, and the sugar in the urine. He did this in all the cases mentioned in his testimony. All of his testimony was based on blood tests as well as urine tests. (*Infra* 29.)

Dr. Cowles had patients on a straight diet without Uvursin, at times they would run out of Uvursin and think they could get along without it, and then they would come back suffering from the symptoms of diabetic increase. (*Infra* 29-30.)

Dr. Cowles did not know which ingredient it was of Uvursin that did the work, it was the combination, he thought. He didn't know what caused the effect, but the effect was there. (*Infra* 30.)

It is, therefore, respectfully submitted:

1. That this is not a case for a death sentence upon assumption;

2. That the door should not be closed to the clinical test desired by the Commission's own witness, and prayed, in the Circuit Court, by petitioner; and

3. That the Order to Cease and Desist, and its affirmance by the Circuit Court, should be reversed, with an order and direction for the clinical test.

4. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

FIRST: The decision is in conflict with *Farris v. Interstate Circuit* (Fifth Circuit), 116 Fed. (2d) 409, at pages 411-12, where it is held that a witness was not qualified as an expert on the subject of inquiry. The three Commission witnesses were qualified on the basis of their general knowledge, although none of them had any basis of particular knowledge on Uvursin as a combination of plant materials or on its effect when used with a patient.

Please also see *Westinghouse Electric & Mfg. Co. v. Denver Tramway Co.* (District Court), 3 Fed. (2d) 285, at 294, for a statement of the rule.

SECOND: The decision is in conflict with *Kidder Oil Company v. Federal Trade Commission* (Seventh Circuit), 117 Fed. (2d) 892, at page 894, where it is held that the primary question for decision was whether the findings of fact as made by the Commission are sustained by substantial evidence. There was no substantial evidence against Uvursin. The order is based on the general knowledge of the Commission witnesses who professed no actual knowledge on the subject. (*Supra* 6.)

THIRD: The decision is in conflict with *Capon Water Company v. Federal Trade Commission* (Third Circuit), 107 Fed. (2d) 516, at 517, where it is held that if the water in question did possess separate curative properties, their use and so their advertisement should be encouraged. Uvursin has been used successfully. (*Supra* 14.)

Conclusion.

The Court stated in its opinion that "It goes without saying that the petitioner was itself at liberty to have clinical tests of this character conducted and to present the results to the Commission if it saw fit", meaning the clinical test proposed by Dr. Modern.

Under the rules stated in *Century Metal Craft Corp. v. Federal Trade Commission* (Seventh Circuit), 112 Fed. (2d) 443, at 447, the grant of original jurisdiction to the Circuit Court to enforce, set aside, or modify orders of the Federal Trade Commission carries with it the power in the Circuit Court to thereafter vacate or modify its decree in this Uvursin case whenever good cause is shown to exist as a result of changed conditions.

Petitioner asks why the burden should be placed upon it to conduct and present clinical tests, in view of the rejection of the clinical proof furnished by Dr. Cowles, when the Commission's own witness proposed the test to qualify himself with competent knowledge, and when he is so situated in a great hospital as to make the test acceptable to all, and when this is prayed by petitioner without condition except that it be represented by an acceptable physician in the conduct of the test.

Petitioner respectfully urges that as a matter of public policy, under the increasing mortality rate of diabetes, the Insulin monopoly should not be fostered upon incompetent testimony and that the test should be ordered and directed as prayed by petitioner. (*Supra* 17.)

It is respectfully submitted that this petition should be granted.

ZACH LAMAR COBB,
Counsel for Petitioner.

September, 1942.

APPENDIX.

Statement of Dr. Cowles' Testimony Contained in Petitioner's Exceptions to Report of Trial Examiner.

In paragraph 8 of the Assignment of Errors [R. 363], petitioner adopted its Exception 14 to the report of the Trial Examiner, where a more complete statement of testimony of Dr. Cowles was set forth, and in which petitioner requests the Commission to include the fuller facts in its findings [R. 42], as follows:

> "He has seen cases of diabetes where insulin failed as a remedy." [R. 44.]
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> "Some diabetic cases have been high spots in his practice. Others are not any more than the usual country doctor would have. His first bet always is with insulin and after a time he can take them from the insulin and put them on Uvursin, because it is more convenient, satisfactory, and cheaper for them. He can still keep control of them and get a general clinical picture of them where it is necessary. He has had some very striking cases." [R. 45.]
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> "The first case he mentioned was a man seventy-six years old. He came to the office suffering from progressive arthritus obliterans, known as Berger's disease, a disease that is picked up at the terminal vessels between the arteries and the veins, the capillaries will fill up and the tissue dies causing great pain, because the nerves are crying out for food all the time. This cry and the resulting pain is terrific, and with this man both his legs died. He had to amputate one leg above the knee and he amputated the other up almost to the hip. After that the stumps and sutures wouldn't heal." [R. 45.]